



November 4, 2002

Mr. S. Anthony Safi  
Mounce, Green, Myers, Safi & Galatzan  
P.O. Box 1977  
El Paso, Texas 79950-1977

OR2002-6272

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171692.

The El Paso Independent School District (the "district"), which you represent, received a request for a copy of an "audit" concerning the purchase of a software package. The district has interpreted the request as pertaining to the "Review of Tudor Publishing Company/EdVision Corporation Contract." You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You state that you have released the remaining information to the requestor. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the entire requested document is a report prepared for the district. Section 552.022(a)(1) of the Government Code provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is excepted from required public disclosure unless made confidential by other law. The entire report must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Section 552.103, which excepts information relating to litigation, section 552.107, which excepts information within the attorney-client privilege, and section 552.111, which excepts information within the attorney work product privilege, are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 630 (1994) (section 552.107 is a discretionary exception), 473 (1987) (governmental body may waive

sections 552.103 and 552.111). Thus, the district may not withhold the submitted information under section 552.103, 552.107 or 552.111 of the Government Code.

However, the attorney-client and attorney work product privileges are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 503 or Rule 192.5.

An attorney’s work product is confidential under Rule 192.5. Work product is defined as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Tex. R. Civ. P. 192.5(a). Accordingly, to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). You tell us that the report in question was prepared by the district’s C.P.A. after the district’s board met with you, the district’s attorney, to discuss a potential lawsuit. The report was then presented in closed meetings to certain committees of the district’s board as part of consultations with you in anticipation of litigation. Therefore, we agree that the report falls within the work-product definition of Rule 192.5(a) as material prepared by the governmental body’s consultant in anticipation of litigation. None of the exceptions listed in Rule 192.5(c) apply in this instance.

Accordingly, the district may withhold the three parts of the report that it seeks to withhold. Because we find that the information is protected by Rule 192.5, we need not consider the applicability of Rule of Evidence 503.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer E. Berry".

Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 171692

Enc: Submitted documents

c: Ms. Tammy Founce-Olivas  
El Paso Times  
P.O. Box 20  
El Paso, Texas 79999  
(w/o enclosures)